Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: W.M.P. Security Service, Co.

File: B-238542

Date: June 13, 1990

William G. Perez, for the protester.
William Davis, for Ogden Allied Government Services, an interested party.
Paula J. Barton, Esq., Department of State, for the agency.
Jacqueline Maeder, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. General Accounting Office denies protest that an unreasonable financial risk is posed by clause in solicitation for embassy guard services which provides for price adjustments where the contractor's costs are changed as a result of laws enacted by the host government--typically, increases in the minimum wage--where clause is not ambiguous or arbitrary or creates a risk an offeror may not be expected to assume in pricing its proposal.

2. The application of the Prompt Payment Act to an overseas contract is not unreasonable on basis that the applicable interest rate is based on the U.S. Treasury rate which may not reflect the rate of inflation in the foreign country because the Act requires every federal agency to pay an interest penalty on amounts owed to contractors when the agency fails to pay within 30 days from receipt of invoice and establishes the interest penalty by statute.

3. Liquidated damages rates are not improper just because they are based on the labor rate of a government employee who will not actually perform the inadequately performed services where such rates reasonably reflect the measure of damages.

4. Failure to conduct a preproposal conference is not improper since preproposal conferences are held at the discretion of the contracting officer and where, as here, all questions from offerors were compiled, answered, and distributed as an amendment to the solicitation.

5. Solicitation provision requiring contractor to remove unsatisfactory on-site representative at no cost to the government is reasonable where solicitation states standards of conduct that the government requires of contractor personnel.

DECISION

W.M.P. Security Service, Co. protests request for proposals (RFP) No. CR89-S-112-FA-502, issued by the Department of State for guard services at the United States Embassy, Costa Rica. W.M.P. has raised a number of objections to the solicitation's provisions which, taken together, essentially amount to a contention that the contracting agency has arbitrarily allocated financial risk between the government and the contractor. Specifically, W.M.P. argues that the solicitation sets forth arbitrary and artificial standards for making price adjustments, includes unfair Prompt Payment Act and improper liquidated damages provisions, fails to provide for a preproposal on-site conference, and contains a provision which improperly allows the government to require the contractor to replace at "no cost to the [g]overnment" an on-site representative that the government deems unacceptable.

We deny the protest.

The RFP, issued on December 15, 1989, contemplated award of a firm, fixed-price contract with economic price adjustments for guard services at Embassy facilities for a 1-year period, with four 1-year options. Closing date for receipt of proposals was February 15, 1990, but this date has been indefinitely suspended pending resolution of this protest.

PRICE ADJUSTMENTS

W.M.P.'s initial basis for protest concerns section B.4. of the RFP, price adjustment provision, which prescribes under what circumstances adjustments in the contract price will be made and how those adjustments will be calculated.

Section B.4. provides that "the contract prices shall not be adjusted due to variations in the [c]ontractor's direct or indirect costs, unless such changes result from laws enacted by the host government." The "laws" with which the Embassy is particularly concerned, based on its experience, are those increasing the minimum wage. Section B.4. provides

that adjustments in contract prices resulting from laws enacted by the host government will be calculated as follows:

> "The U.S. Dollar cost of one hour of minimum wage labor at the time of adjustment (using the buy rate of exchange for that day), minus the same cost at the beginning of the contract period (or period since the last adjustment, using the buy rate of exchange for that day), will provide a percentage increase. This percentage will be applied to 75% of the hourly rate; 25% of the hourly rate will not be adjusted, as it will be assumed for the purpose of this calculation, that this portion of the contract price will not be affected by an increase in the minimum wage. All local currency payments made after an adjustment to the contract price will be calculated using the buy rate of exchange in effect on the effective date of the adjustment."

The protester argues that this price adjustment provision imposes unacceptable financial risks in that it involves a currency conversion and is arbitrarily applied to only 75 percent of the hourly rate.

More specifically, W.M.P. argues that, since the contract price is to be established in Costa Rican colones, calculating price adjustments in U.S. dollars introduces a variable into the computation which unfairly imposes on the contractor the risk of currency devaluation. W.M.P. also questions the use of the term "buy rate of exchange," which the protester says "subjects the offeror to unpredictable manipulation of the U.S. [g]overnment." Finally, W.M.P. argues that applying the price adjustment to only 75 percent of the contract cost is inappropriate, in that it assumes that changes in the host government laws will affect only the minimum wage and that prices offered by different offerors will have different percentages of costs attributable to the minimum wage, not simply an arbitrary 75 percent. W.M.P. argues that any price adjustment should be made on the entire contract price rather than on the 75 percent denominated in the price adjustment provision.

Initially, the agency points out that the solicitation does not require the contract price to be expressed in colones; to the contrary, prices in the Embassy's guard contracts

historically have been stated in U.S. dollars.1/ Moreover, the agency states, the Embassy had to select some currency for describing a methodology for adjusting the firm, fixed-price of the contract and the U.S. dollar was chosen because government budgeting and accounting procedures mandate its use.

Further, the agency reports that the "buy rate of exchange" that the protester questions is the legal rate of exchange established by the Central Bank of Costa Rica for buying local currency with dollars. The agency disputes the protester's assertion that this legal rate of exchange is subject to "manipulation" by the U.S. government and notes that the use of the term "buy rate" in solicitations for work outside the United States is standard practice. In this regard, we note that a potential offeror who submitted comments on the protest in advance of the agency's report defined "buy rate of exchange" in the same manner as the agency, a circumstance which supports the agency's position.

Finally, as to the protester's argument that any price adjustment should be made on the entire contract price and not merely on 75 percent of the price, the agency states that this 75 percent figure is the Embassy's best estimate that in a guard force contract, approximately 75 percent of the hourly labor rate is labor costs (direct salaries and associated fringe benefits). The remaining portions of the hourly labor rate are for costs other than labor (direct cost, profit, etc.) which would not be affected by changes in the Costa Rican labor law.

Generally speaking, it is our view that offerors have the responsibility in offering on a fixed-price contract to project costs and to include in their proposed fixed-prices a factor covering any projected cost increases. Risk is inherent in most types of contracts and offerors are expected to allow for that risk in computing their offers. For example, with respect to the guard services contract for the United States Embassy, El Salvador, we recently found unobjectionable a solicitation provision which stated that the exchange rate in effect on the date of award would apply

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1/ Although the contract price is expressed in U.S. dollars, the RFP provides that if the contract is awarded to a firm that is not chartered in the United States, payment will be in local currency. If the contract is awarded to a U.S. firm, 20 percent of the payment will be in U.S. dollars and the remaining 80 percent will be in local currency using the buy rate of exchange, as changed with each adjustment to the contract price.

to the base and option years. S.P.I.R.I.T. Specialist Unlimited, Inc., B-237114.2, Mar. 8, 1990, 90-1 CPD ¶ 257. In that decision, we recognized that such a provision had the effect of shifting to the offerors "the possibility of increased contract costs in the event the Salvadoran currency continued to devalue," but concluded that risk did not render the solicitation improper where it could be taken into account by offerors in computing their offers. The solicitation at issue here would appear to involve less of a financial risk to the contractor than the one in S.P.I.R.I.T., in that here there is a price adjustment provision which sets forth a specific mechanism for adjusting the price in the event the host government enacts laws increasing the minimum wage, and a payment provision which states that:

> ". . . the local currency amount of payment will be calculated using the buy rate of exchange used by the Contractor in the original solicitation, until such time as the Government makes an adjustment to the contract price. Each adjustment to the contract price will incorporate a new exchange rate which will be used from that time to calculate the local currency amount of payment."

The agency considers this adjustment procedure to be a reasonable means for the parties to calculate costs to protect both the government and the contractor. We agree and find the cost adjustment procedure unobjectionable; it provides an objective means for calculating contract price increases due to changes in the minimum wage enacted in the host country. Indeed, by revising the rate of exchange at the time of each adjustment, rather than remaining with the one in effect at the time of award, the government is subjecting itself to the possibility of increased contract costs in the event the Costa Rican currency continues to devalue. In addition, although the protester strongly objects to the exclusion of 25 percent of the contractor's hourly labor rate from any price adjustment, we have no basis on this record to conclude that this is not a reasonable approximation of that part of the hourly labor rate which includes costs other than labor.

PROMPT PAYMENT ACT

W.M.P. next argues that the solicitation's application of the Prompt Payment Act is unfair in the context of this contract. The Prompt Payment Act, 31 U.S.C. §§ 3901-3907 (1988), requires every federal agency to pay an interest penalty on amounts owed to contractors for the acquisition

of property or services when the agency fails to pay within 30 days from receipt of a proper invoice. The interest penalty is established by the Secretary of the Treasury under section 12 of the Contract Disputes Act of 1978 (41 U.S.C. § 611) and is published in the Federal Register semiannually. Federal Acquisition Regulation (FAR) § 52.232-25(b)(a)(6) (FAC 84-49). The protester argues that because the rate of inflation is so much higher in Costa Rica than in the United States, tying late payment penalties to the U.S. interest rate does not properly penalize the government or compensate the contractor. The protester hypothesizes that under these circumstances the government might conclude that it is to its advantage to "delay payment to infinity" rather than timely pay its contractor upon receipt of a proper invoice.

As we indicated above, the inclusion of the Prompt Payment Act provision, and the application of U.S. Treasury rates of interest, are statutory requirements. Given these circumstances, we do not believe it is improper for the State Department to include this clause in the solicitation. Furthermore, we have no reason to believe that the contracting agency would intentionally delay making payment under this contract. Any financial risk the protester perceives with regard to late payments should be factored into its offered price.

LIQUIDATED DAMAGES PROVISIONS

The protester contends that the solicitation improperly permits a deduction from the contract payment for deficient performance in excess of the value of the tasks actually performed deficiently, and thus constitutes a punitive deduction, prohibited by the FAR Subpart 12.2 ("Liquidated Damages"). Specifically, the deduction provision complained of allows a deduction equivalent to "the government cost of the loaded labor rate paid to the Embassy Assistant Regional Security Officer (ARSO)." W.M.P. complains that, since it is doubtful that the ARSO will actually stand guard duty, this amount bears no relationship to the actual costs that would be incurred if the services are not provided as required and therefore should not be used as a measure of damages.

While the agency admits that the ARSO will not stand guard duty at an unstaffed post, it maintains that the deduction provision is reasonably related to the probable actual damages which would occur if the required services were not performed, especially given the criticality of the services to be performed. The agency points out that, in the event of deficient performance, the ARSO and other Embassy

personnel would have to devote additional time and make immediate decisions concerning the allocation of the available guard resources. The agency argues that unstaffed guard posts are a serious matter and the actual cost to the government of a disruption in providing guard services is much more than the ARSO's loaded labor rate.

The general rule is that fixed amounts the government can recover from the contractor without proof of the damages actually sustained--liquidated damages--must be reasonable in light of the solicitation's requirements. FAR § 12.202(b) (FAC 84-51). Liquidated damages fixed without any reasonable reference to probable actual damages may be held an unenforceable penalty. Crown Management Servs., Inc., B-232431.2; B-232431.3, Jan. 24, 1989, 89-1 CPD ¶ 64. Before we rule that a liquidated damages provision imposes a penalty, however, the protester must show there is no possible relation between the amounts stipulated for liquidated damages and losses contemplated by the parties at the time the contract is formed. Ameriko Maintenance Co., B-230994, July 22, 1988, 88-2 CPD ¶ 73.

We find that the protested provision is not arbitrary or otherwise unreasonable. Initially, we see nothing improper in the agency's consideration of the criticality of the services in computing the value of the service if foregone. In this regard, the agency reports that the contract guard force is one of the most important elements of the Embassy's security program and that particularly in view of existing budget constraints the solicitation only includes those posts deemed essential to the protection of lives and property. Further, we have found that an agency may use a field office labor rate as a proper measure, even if government employees will not perform the inadequately performed services, unless the contractor demonstrates that this measure is unreasonable. Ameriko Maintenance Co., B-230994, supra. Since W.M.P. simply suggests that the method of computing liquidated damages is unfair because the ARSO personally will not stand guard duty, we find that W.M.P. has not met its burden of showing that the deduction is unreasonable.

SITE VISIT AND PREPROPOSAL CONFERENCE

Although the RFP provides that offerors may independently visit the Costa Rica site upon making arrangements with the ARSO, there is no provision for a preproposal on-site conference. W.M.P. argues that by not providing for a preproposal on-site conference, the government is not ensuring fair competition since each offeror is not

guaranteed of receiving identical site visits and identical information.

We note that preproposal conferences are held at the discretion of the contracting officer to brief prospective offerors in complex negotiated acquisitions or explain or clarify complicated specifications and requirements. FAR § 15.409 (FAC 84-53). The agency explains that there is nothing complicated about the specifications or requirements in this solicitation. Moreover, to ensure that questions were addressed and that all offerors were given the same information, the cover letter to the solicitation noted that there would be no preproposal conference and invited written questions. Embassy staff were directed not to telephonically answer any questions from offerors but to compile a list of questions which the contracting officer answered in a solicitation amendment distributed to all potential offerors. Although the protester continues to argue that "it is clear that offerors will be provided different information" during different site visits, there is no indication that any offerors requested a site visit. Given these factors, we think the precautions taken by the agency are sufficient to ensure that the same information is provided to all offerors.

REPLACEMENT OF ON-SITE REPRESENTATIVE

Finally, W.M.P. objects to the provision in the solicitation under which the government may require the contractor to replace an on-site representative who is found to be unacceptable to the government. The protester contends that this provision is arbitrary and capricious because the solicitation does not establish the bases for a determination of unacceptability and--because all replacement costs are to be borne by the contractor--the provision exposes the contractor to unnecessary financial risk.

The solicitation, however, clearly states the standards of conduct that the government requires of contractor personnel, including employee competence, conduct, cleanliness, appearance, and integrity. Certainly, any contractor involved in providing security guard services at embassies abroad must understand the importance of protecting American facilities, information, and personnel. Common sense dictates that the government would apply reasonable standards to determine employee acceptability and careful investigation and screening of prospective employees by the contractor should remove any significant risk to the contractor. Therefore, we do not believe that the agency

need spell out in more detail than what is outlined in the solicitation the criteria of conduct that it expects.

The protest is denied.

for James F. Hinchman
General Counsel